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IN THE

Supreme Court of the United States

October Term, 1941

AMERICAN NATIONAL BANK AT INDIANAPOLIS, as Trustee,
Petitioner,

v.

THE SERVICE LIFE INSURANCE COMPANY,
Respondent.

No. 343

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM H. THOMPSON,
PERRY E. O'NEAL,
PATRICK J. SMITH,
Counsel for Petitioner.

MARK GRAY CO., INDIANAPOLIS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

American National Bank at Indianapolis, as Trustee, respectfully petitioning, shows the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

A. Nature of the action and decrees below.

This suit was commenced by petitioner, as Trustee, against respondent, to recover the face amount of $5,000.00

on a policy of life insurance issued by the respondent on the life of Charles Leona Badger. (R. 1-3.)

Trial was held by the Court without the intervention of a jury. The trial court made findings of fact (R. 12-57), and stated its conclusions of law thereon to the effect that the law was with the petitioner. (R. 57.)

Judgment was entered for petitioner. (R. 57.) Respondent appealed to the Circuit Court of Appeals for the Seventh Circuit. (R. 58.) The cause was reversed and it was held that the policy had expired one day prior to the death of insured, Charles Leona Badger. (R. 70-77.)

The opinion of Judge Briggle (R. 70-77) held that in the computation of time *from the date of the policy* (as provided in the policy), that the first day should be included and the last excluded.

Petitioner filed its petition for a rehearing within the time allowed (R. 78) which was denied by the Circuit Court of appeals without opinion. (R. 80.)

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Acts of February 13, 1925, C-229 (43 Stat. 938); June 7, 1934, C-426 (48 Stat. 926, 28 U.S.C. 347).

The opinion of the Circuit Court of Appeals was filed and a decree entered on May 9, 1941. (R. 77.) Petitioner's petition for a rehhearing was filed within the time allowed by the rules of said court, to-wit: on May 24, 1941 (R. 78), and

was denied by the Court without opinion on May 29, 1941 (R. 80).

This petition for certiorari was filed before the expiration of three months from May 29, 1941.

III.

STATEMENT OF FACTS.

The facts were stipulated. (R. 12.) The Court adopted the written stipulation of the parties as its special findings of fact. (R. 12.)

The respondent on October 5, 1930, issued its policy of life insurance on the life of Charles Leona Badger in the face amount of $5,000.00 in consideration of the payment in advance of an annual premium of $299.85 (R. 47; 40-50).

The insured, paid four full annual premiums. (R. 41.) No premium was paid on October 5, 1934, or thereafter. The policy was free from indebtedness, and all policy dividends had been paid. (R. 14.)

On January 2, 1935, after the due date of the 1934 premium, respondent wrote insured that:

> "You are hereby notified that the above numbered policy, which you allowed to lapse through non-payment of premium, is now continued as Non-Participating Term Insurance *dated from October 5*, 1934, which is the due date of the premium in default.
>
> Please inform us of any future change in your residence or post office address." (R. 14, offered R. 11.) (Emphasis supplied.)

On January 8, 1935, the insured wrote respondent as follows:

> "I am in receipt of yours of the 2nd inst. saying that my policy No. 5221 was now continued as non-participating term insurance, *dated from 10-5-34.*
>
> Will you please inform me of the date of expiration of this term insurance. I wish to know at this time the date on which this insurance will expire.." (R. 15, offered R. 11.) (Emphasis supplied.)

Respondent answered the insured's letter on January 11, 1935, saying:

> "Thank you very kindly for your letter of January 8, concerning your policy No. 5221.
>
> In answer to your question as to how long your policy will be continued under the extended insurance feature, we wish to advise that it will continue under this feature *to February 5*, 1939.
>
> Sincerely trusting that the above answers your inquiry satisfactorily, and with best wishes, we are." (R. 15, offered R. 11.) (Emphasis supplied.)

The policy provided in part that:

> "In consideration of the written and printed application for this policy and the further consideration of the sum of Two Hundred Ninenty-nine Dollars, Eighty-five Cents *to be paid in advance*, being the premium for the *term ending one year from the date hereof*, and the legal reserve, if any, and the further payment *in advance* of annual premiums of $299.85 *on or before the 5th day of October* of each year, during the continuance of this policy, or until nineteen full years' premiums including the first have been paid, this policy is issued." (R. 41, offered R. 11.) (Emphasis supplied.)

The date referred to by the words "from the date hereof" is October 5, 1930 (R. 47).

The policy also provided that:

> "All premiums, both first and renewals, are payable *in advance* . . . ." (R. 44, offered R. 11.) (Emphasis supplied.)

After the payment of four full annual premiums, as in this case, the policy provided that insured had automatic extended insurance for four years and four months. (R. 46.)

The fourth full annual premium was paid in advance by the insured in 1933. The advance premium due on or before October 5, 1934, was not paid.

The insured died at Indianapolis, Indiana, at 7:55 P. M., on February 5, 1939. (R. 16.)

At the request of insured, American National Bank at Indianapolis, Trustee under a Trust Agreement as of May 4, 1934, petitioner (R. 19-34, offered R. 11) was named beneficiary under the policy. (R. 35.)

After the death of insured, petitioner properly furnished to respondent, the proofs of deaths required (R. 16.)

IV.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, there is presented the following important questions:

1. Whether the Circuit Court of Appeals wholly disregarded the applicable Indiana law and thus violated the rule established by this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188; *Stoner v. New York Life Insurance Co.*, 85 L. ed. (adv.) 275, *Wichita Royalty Company et*

al. v. City National Bank, 306 U. S. 103, and *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Company,* 85 L. ed. (adv.) 631, and similar cases in deciding as follows:

(a) That, in computing the four years and four months automatic extended insurance to which the insured became entitled upon default in premium payments, the first day, viz: October 5, 1934, is to be included, and hence the extended insurance expired at the end of the day on February 4, 1939; one day prior to insured's death.

(b) In deciding that the words of the policy *"for the term ending one year from the date hereof"* (R. 41) did not require the exclusion of the first day, viz: October 5, 1934, in determining the duration of four years and four months of extended insurance.

(c) In holding that the policy terms were unambiguous.

V.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way in conflict with the applicable decisions of the appellate courts of Indiana in disregard of the rule established by this Court in *Erie Railroad v. Tompkins,* 304 U. S. 64; *Stoner v. New York Life Insurance Company,* 85 L. ed. (adv.) 275; *Wichita Royalty Company, et al. v. City National Bank,* 306 U. S. 103; *Equitable Life Insurance Co. of Iowa v. Halsey, Stuart &* Company, 85 L. ed. (adv.) 631; and similar cases announcing the same rule, in that it refused to follow the Indiana decisions set out below which hold:

(a) That in the computation of the duration of extended term insurance from the date of the policy as provided by the insurance contract, the first day is to be excluded and the last day included because the word "from" is a word of exclusion and not of inclusion.

Matthews Farmers Mutual Life Stock Insurance Co. v. Moore (1914), 58 Ind. App. 240, 245;

Williams v. Chambers, et al. (1926), 85 Ind. App. 404, 406, 407.

(b) That ambiguous provisions of insurance policies should be construed most favorably to the insured in order to avoid a forfeiture, and most strongly against the insurance company because it prepared the policy contract.

Masonic Accident Insurance Co. v. Jackson (1928), 200 Ind. 472, 481, 482;

Atkinson, Administrator, v. Indiana National Life Insurance Co. (1924), 194 Ind. 563, 568;

Federal Life Insurance Co. v. Kerr (1909), 173 Ind. 613, 618.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its dockets No. 7499, *American National Bank at Indianapolis, as Trustee, v. The Service Life Insurance Company*, and that the decree of said United States Circuit Court of Appeals in said cause be re-

versed by this Court, and that the petitioner have such other and further relief in the premises as to this Court may seem just.

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